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No. 85-1370

In the Supreme Court of the United States

OCTOBER TERM, 1985

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

vs.

CHARLES D. RAGLAND,
Commissioner of Revenues,
Appellee.

ON APPEAL FROM A DECISION OF THE
SUPREME COURT OF ARKANSAS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CITY & REGIONAL MAGAZINE ASSOCIATION IN SUPPORT OF APPELLANT

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Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE CITY & REGIONAL MAGAZINE ASSOCIATION IN SUPPORT OF APPELLANT

The City & Regional Magazine Association hereby respectfully moves for leave to file the annexed Brief *Amicus Curiae* in this case in support of Appellant, pursuant to Rule 36.3 of the Rules of this Court.

The Appellant has consented to the filing of this brief, and has filed its consent with the Clerk. Consent of Appellee was requested but refused.

INTEREST OF THE AMICUS CURIAE

The City & Regional Magazine Association (CRMA) is the national organization of general interest magazines which serve the population of specific geographical areas. The 39 magazines which comprise the active membership of CRMA have a total of over two-and-a-half million paying readers.[1] Because of the magazines' inherently local emphasis, almost all of these two-and-a-half million people buy the magazines in the state in which they are published, and almost all would therefore have to pay any sales tax applied to the sale of the magazines.

City and regional magazines are like local newspapers in many ways. Both kinds of publications disseminate information of general public interest, but focus on the concerns of the near-by populace. Both contain classified and display advertising. Both report on news via stories that vary in length and writing style, from "hard news" to short

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1. The member magazines of CRMA (and their approximate paid circulations) are: Arkansas Times (29,000); Atlanta Magazine (56,000); California Magazine (300,000); Chicago Magazine (220,000); Cleveland Magazine (50,000); Columbus Monthly (34,000); Connecticut Magazine (88,000); Country/Mid-Atlantic Magazine (100,000); D (Dallas) Magazine (80,000); Delaware Today Magazine (14,500); Denver Magazine (20,000); Detroit Monthly (44,000); Honolulu Magazine (25,000); Houston City Magazine (60,000); Indianapolis Monthly (30,000); KS (Kansas) Magazine (10,000); Louisiana Life (49,000); Louisville Magazine (20,500); Metropolitan Detroit (90,000); Miami/South Florida (29,000); Milwaukee Magazine (36,000); MPLS/St. Paul Magazine (47,000); NASHVILLE! (24,000); New England Monthly (85,000); New Jersey Monthly (95,000); New Mexico Magazine (90,000); North Shore Magazine (33,500); Oregon Magazine (30,000); Phoenix Metro Magazine (35,000); Pittsburgh Magazine (58,000); Sacramento Magazine (23,500); San Diego Magazine (58,000); San Francisco Focus (158,000); St. Louis Magazine (35,000); Texas Monthly (280,000); Toronto Life (95,000); The Washington (D.C.) Dossier (38,000); Washington (State) Magazine (68,000); West Michigan Magazine (22,000).

"features."[2] Both offer information on local activities, the arts, and restaurants.[3] Both feature political reporting and editorial opinion.[4] Indeed, because individual magazines and newspapers vary to a great extent, perhaps the most ubiquitous distinction between newspapers and city and regional magazines is the quality of the paper on which they are printed.

The interest of CRMA in this appeal is many-fold. First, the publication which is at the center of this case, the Arkansas Times magazine, is a member of CRMA.

Second, each of the 38 other member magazines which are members of CRMA are similarly situated to the Arkansas Times, and each of the 2.5 million paying readers of

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2. Indeed, in head-to-head competition, it is often the magazines that are considered the best source of news. For example, in recent judging, Washington Magazine won 19 awards for excellence in journalism from Sigma Delta Chi, including first place, third place, and honorable mention for "general news reporting"; Milwaukee Magazine received first place awards from the Milwaukee Press Club for best single background story and best locally written story; and D Magazine was cited by the Press Club of Dallas for best news story, and given the outstanding reporting awards of The National Association of Secondary School Principals and the Dallas Bar Association. *CRMA Communicator*, July, 1986, at 3.

3. A nearly universal feature of city and regional magazines is a calendar of entertainment and arts offerings for the local area, and an extensive listing of restaurant reviews. Courts have often recognized the public importance of this sort of consumer information, and that such information is entitled to First Amendment protection. *See, e.g., Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 485 n.1 (1984) (consumer magazine protected); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected.").

4. The public importance of information such as this has led courts to find First Amendment protection for political and editorial speech imperative. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ... U.S. ....., 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

CRMA member publications are similarly situated to the readers of the Arkansas Times. CRMA is thus interest in this case because it raises issues concerning the constitutional limits on the power of the states to discriminate between different industries and the press, and between different types of publications, for the purposes of applying a state sales tax.

Third, several members of CRMA are now involved in disputes with the taxing authorities of their states concerning the application of state sales taxes, and sales tax exemptions, to their publications—disputes quite similar to the one between the parties to this case. As the annexed brief demonstrates, in many states, members of CRMA are subject to sales taxes notwithstanding that other industries and other publications are exempt from the tax. In some instances, because city and regional magazines are by nature "general interest" publications, they, like the Arkansas Times, "fall between the cracks" of apparently broad tax exemptions.

Finally, the CRMA, a news media organization, is interested in the scope of the First Amendment's protections and concerned that its safeguards fully embrace those who report on matters of public concern in some format other than that of a traditional daily newspaper.

PERSPECTIVE OF THE AMICUS CURIAE

The issues before this Court in this case have implications extending far beyond the borders of the State of Arkansas. As the national organization of city and regional magazines, CRMA wishes to emphasize the broader, national ramifications of the questions now before the Court. To that end, the annexed Brief *Amicus Curiae*

surveys the sales tax codes in all 50 states and the District of Columbia, particularly noting that most states have historically exempted the sale of information which is of public concern from their sales taxes.

This brief also analyzes the nature of the Arkansas Gross Receipts Tax to determine whether it is a law of general applicability or a law which has been used to discriminate against the press as well as other industries.

Counsel for this *amicus* has consulted with counsel for the appellant and determined that the arguments advanced here are not duplicative of the arguments advanced in appellant's initial brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE CITY & REGIONAL MAGAZINE ASSOCIATION IN SUPPORT OF APPELLANT

INTEREST OF THE AMICUS CURIAE

The City & Regional Magazine Association (CRMA) stated its interest in this case in its motion for leave to file a Brief *Amicus Curiae* and incorporates that statement here by reference.

SUMMARY OF ARGUMENT

This Court has held the press may not be taxed differently than other enterprises in the absence of overriding interests of compelling importance.

The Arkansas Gross Receipts Tax is a tax which treats the press differently than other enterprises. Unlike

laws of general applicability which may be applied to the press, the Arkansas tax historically has been used for various policy reasons to encourage some industries and to discourage others.

Arkansas and numerous other states which also use their sales taxes for discriminatory purposes have recognized that application of this particular type of tax against the press infringes on First Amendment freedoms by exempting most publications from the tax which distribute news of public concern.

Refusing the Arkansas Times the protection which other publications are given abridges the First Amendment because the Arkansas Times also publishes matters of public concern.

The State of Arkansas has no overriding interests of compelling importance in imposing its Gross Receipts Tax on sales of Arkansas Times magazine, but not on the sales of other like publications and numerous other enterprises. Accordingly the tax abridges the First Amendment.

ARGUMENT

I.

The Arkansas Gross Receipts Tax Cannot Be Applied to Sales of the Arkansas Times Magazine Absent Overriding Interests

This Court made clear in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner*, 460 U.S. 575 (1983), that taxes which are not of general applicability may not be applied against the press absent overriding

state interests. An analysis of the Arkansas Gross Receipts Tax shows that, for purposes of constitutional analysis, it plainly cannot be labeled a tax of general applicability. It is a discriminatory tax, which like other state sales taxes, historically has not been applied against the press. In addition, the record shows that the Arkansas Times magazine is entitled to the same degree of First Amendment protection which newspapers received in *Minneapolis Star*. Therefore, the Arkansas Gross Receipts Tax, Ark. Stat. Ann. §§84-1901 et seq., may not be assessed against sales of the Arkansas Times magazine in the absence of overriding interests.

A. A Tax Which Treats the Sale of Information Differently From Other Sales May Not Be Upheld Absent Overriding Interests

"A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest."[1] In

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1. *Minneapolis Star*, 460 U.S. at 582 (1983). The City & Regional Magazine Association does not agree with the conclusion reached in dicta in *Minneapolis Star* that "a generally applicable sales tax" may be imposed against the press. 460 U.S. at 586 n.9. That opinion also stated that "Nothing . . . prevents the State from taxing the press in the same manner that it taxes other enterprises. It can achieve its interest in requiring the press to bear its share of the burden by taxing the press as it taxes others, so differential taxation is not necessary to achieve." *Id.* at 590 n.12. Both of these statements—which plainly were unnecessary to the decision before the Court, *id.* at 593 (White, J., concurring)—were based on an overly broad reading of *Breard v. City of Alexandria*, 341 U.S. 622 (1951), a case which upheld a penal ordinance prohibiting door-to-door solicitations, including solicitations by persons selling subscriptions to magazines. The *Breard* case involved no issue regarding taxation and did not, notwithstanding, the protests of the dissenters, disturb such cases as *Follett v. McCormick*, 321 U.S. 573 (1944), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), which had clearly held that a flat tax, such as the sales tax, cannot be imposed on the exer-

(Continued on following page)

striking down Minnesota's tax on the use of ink and paper, this Court established in *Minneapolis Star* that a tax such as that imposed by the Arkansas Gross Receipts Tax is a tax which burdens a right protected by the First Amendment.

This Court emphasized in *Minneapolis Star*, however, that the First Amendment provides no defense against a regulation of general applicability and cited a number of specific examples of cases where such challenges had been unsuccessful. 460 U.S. at 583. On the other hand, the Court held, "Differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.* at 585. As it did in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court rooted its *Minneapolis Star* decision in history. "There is substantial evidence," the Court concluded, "that differential taxation of the press would have troubled the Framers of the First Amendment." 460 U.S. at 583.

Footnote continued—

cise of a privilege granted by the Bill of Rights. "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him on the privilege of delivering a sermon. . . . The power to tax the exercise of a privilege is the power to control or suppress its employment." *Murdock*, 319 U.S. at 112. In *Breard*, the ban on solicitation was justifiable because it served the important public purpose of protecting the privacy and security of the home and it employed the least restrictive means possible to do so. Therefore, the ordinance was upheld even though it imposed an incidental restriction on First Amendment rights. Similarly, in the recent case of *Arcara v. Cloud Books, Inc.*, ____ U.S. ____, 54 U.S.L.W. 5060 (July 7, 1986), the Court upheld a criminal ordinance which required the one-year closing of places of prostitution, lewdness, or assignation, notwithstanding that it limited the petitioner's First Amendment right to sell books. But this Court invalidated the taxes on solicitation in *Follett* and *Murdock* because they bore no relationship to the goal of protecting the home from unwanted or dangerous persons; their sole objective was to raise revenue.

Today, then, there is no question that a tax which impacts the exercise of First Amendment rights differently than other activities cannot be justified except by overriding interests.[2] The primary issues for resolution in this appeal are therefore whether the Arkansas Gross Receipts Tax treats sales of the Arkansas Times magazine differently from other sales and, if so, whether the Arkansas Times magazine is protected by the First Amendment.

B. The Arkansas Gross Receipts Tax Treats Sales of the Arkansas Times Magazine Differently From Other Sales

The Arkansas Gross Receipts Tax historically has been used, for policy reasons, to discriminate between different industries, rather than to impose an even-handed tax burden on all taxpayers. This feature of the tax makes it unlike any laws of general applicability which this Court has found inoffensive to First Amendment interests and it creates threats to press freedom which are as great as those created by the Minnesota use tax which this Court held unconstitutional. Therefore, the Court should conclude that the Arkansas tax treats sales of the Arkansas Times differently from the sales of other goods or services.

2. The *Minneapolis Star* decision also concluded that "Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers." 460 U.S. at 592. The Arkansas Gross Receipts Tax suffers from a similar defect. The focus of this brief, however, is the rule which prohibits taxing of the press differently than other enterprises. The point regarding discrimination between different sectors of the press is discussed in detail in the Appellant's brief. CRMA concurs in the arguments advanced therein.

1. The Arkansas Tax Has Been Used to Favor Some Industries Over Others

Arkansas, like the District of Columbia and the 44 other states which tax the sale of tangible personal property,[3] specifically exempts numerous types of sales from the tax.[4] For example, the tax is not imposed on the sale of cotton,[5] the sale of machinery for use in designated enterprise zones,[6] gate receipts from rodeos,[7] the sale of baby chickens,[8] the rental or lease of equipment used in filming certain motion pictures,[9] certain sales to the Boy Scouts of America, Girl Scouts of America, Boys and Girls Clubs of America, the Poets' Roundtable of Arkansas, 4-H Clubs, FFA Clubs, and Future Farmers,[10] as well as the sale of newspapers and four types of publications.[11]

These exemptions, and numerous others,[12] generally reflect policy decisions to promote particular industries,

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3. Only Alaska, Delaware, Montana, New Hampshire, and Oregon do not impose a sales tax.

4. Ark. Stat. Ann. §84-1904 (1985) lists thirty-six exemptions. *See also* The Commerce Clearing House *State Tax Guide* (1986) which provides a convenient summary of all state tax codes and lists the numerous exemptions to each state sales and use tax.

5. Ark. Stat. Ann. §84-1904(m) (1985).

6. Ark. Stat. Ann. §84-1904(r)(2)(B) (1985).

7. Ark. Stat. Ann. §84-1904(k) (1985).

8. Ark. Stat. Ann. §84-1904(r)(2)(E) (1985).

9. Ark. Stat. Ann. §84-1904(w) (1985).

10. Ark. Stat. Ann. §84-1904(g) (1985).

11. Ark. Stat. Ann. §84-1904(f) and (j) (1985).

12. Ark. Stat. Ann. §84-1904 (1985) lists approximately 36 categories of exemptions.

groups, or activities.[13] Cotton always has been a staple of the Arkansas economy, therefore the Arkansas General Assembly exempts the sale of cotton, seed cotton, lint cotton, and baled cotton from the sales tax. In enacting this exemption, the Arkansas Legislature explained: "The production and sale of cotton and cotton seed in this State, being the State's major industry and being essential to the commercial life of the State, it is the intention of this Act that no sale thereof in this State shall be subject to a sales tax."[14] Similar declarations of intention were authored for the baby chickens and enterprise zone exemptions.[15] All such statements reveal the Assembly's purposeful use of its sales tax to accomplish its political objectives.[16]

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13. This Court has permitted state legislatures broad discretion in using their tax codes to implement rational policy objectives where fundamental interests are not affected. *Williams v. Vermont*, ... U.S. ....., 105 S.Ct. 2465, 2472 (1985); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547-48 (1983). However, where a tax classification affects a fundamental interest, closer scrutiny of the discrimination has been required. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336-42 (1972) (right to travel); *Graham v. Richardson*, 403 U.S. 365 (1971) (suspect criteria); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to vote); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (suspect criteria).

14. 1937 Ark. Acts 189 (Pope's Digest §14093).

15. In enacting the baby chicken exemption, the Legislature declared: "[T]he production and sale of baby chickens is one of the newest and most important industries within the State of Arkansas . . . . [I]t is imperative that this General Assembly assist this new industry in every way possible so that it may be competitive with similar industries of other states." 1949 Ark. Acts 15 §3. In explaining the exemption of machinery purchased for use in "enterprise zones," the Legislature stated: "It is the intent of this Act to provide the foregoing exemptions as incentives to encourage the location of new manufacturing plants in Arkansas, the expansion of existing manufacturing plants in Arkansas, and the modernization of existing manufacturing plants in Arkansas through the replacement of old, inefficient, or technologically obsolete machinery or equipment." 1983 Ark. Acts 870 §3.

16. Arkansas is not alone in using its sales tax to accomplish discrimination between industries. Many states exempt

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These exemptions do not remain static, but rather come and go with a high degree of frequency. The compiler's notes following section 84-1904 reflect that the list of exemptions found in the Arkansas Statutes has been amended by 29 separate acts of the Arkansas General Assembly since 1941, including nine acts in the last six years. Arkansas' practice of frequently altering its list of sales tax exemptions, adding some and retracting others, is not unusual. This holds true in many other states as well.[17] The fluidity of these laws has led one state bar association to describe its state sales and use tax as a "law by exemption."[18] The "potpourri of exemptions," the association concluded, results both from "a good faith effort by the legislature to impose a just and uniform tax on all the residents of this state, . . . the political process and the impact of special interest groups."[19]

In addition to the ordinary exemptions for the sale of particular "property," Arkansas[20] and many other states[21]

Footnote continued—

their favorite industries. *See, e.g.*, Iowa Code Ann. §422.45(26) (West 1986) (sales to farmers of farm equipment and machinery); Ky. Rev. Stat. §139.531 (1984) (horses for breeding); Md. Ann. Code art. 81, §326 (1957) (crab bait; sales of crab and seafood for off-premises human consumption); N.C. Gen. Stat. §105-164.13 (1985) (tobacco sold to manufacturers); Tex. Tax Code Ann. §151.324 (Vernon 1982) (equipment used for mineral exploration or production).

17. For example, Florida's list of exemptions, Fla. Stat. §212.08 (1985), has been amended 81 times since 1949.

18. *Fla. State & Local Taxes*, Vol. I ¶14.03[4] (Fla. Bar 1984).

19. *Id.*

20. The Arkansas Sales Tax applies generally to sales of tangible personal property. The tax does not apply to personal or professional services except for certain services delineated in the statute. *See* Ark. Stat. Ann. §84-1903 (1985).

21. *See, e.g.*, Conn. Gen. Stat. Ann. §12-412(11) (West 1986); Fla. Stat §212.08(7) (1985); Mich. Stat. Ann. §7.525(1) (Callaghan 1986); S.D. Codified Laws Ann. §10-45-12.2 (1982).

do not treat the sale of personal or professional services as a sale of tangible personal property. Thus, the sale of a lawyer's brief, an architect's plans, or a doctor's prescription goes untaxed notwithstanding that all of the transactions are accompanied by the transfer of some incidental tangible property.[22] Oddly, the parties and the Arkansas Supreme Court seem to agree that the sale of the journalist's work product does not fall within this broad exemption to the general scheme of taxation.[23]

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22. *See Larey v. Dungan-Allen, Inc.*, 428 S.W.2d 71, 73 (Ark. 1968).

23. It is difficult to understand why the journalist's work product should not be treated as a service. In 1939, before Arkansas had exempted the sale of any publications from its tax, the Arkansas Attorney General delivered an opinion to the Commissioner of Revenues indicating that "the sale of a newspaper is the sale of service and not tangible property and is therefore not subject to the 2% sales tax." State of Arkansas, *Biennial Report of the Attorney General For the Biennial Period 1937-39* at 42. In *Larey, supra* note 22, the Supreme Court of Arkansas rejected an argument that the sale of photographs should be treated as the rendering of services rather than the sale of tangible personal property. "No doubt," the court held, "the photographers' experience and skill are essential to their work, but it is plain enough that the company's customers would not ordinarily pay for the exercise of that skill if it did not enhance the value of the end product." *Id.* at 73. But the Court went on in *Larey* to distinguish physicians' x-rays and architects' blueprints from photographs. The court wrote, "By contrast, a physician is engaged to diagnose and treat illnesses, not to produce and sell x-rays. An architect is employed to design and supervise the construction of buildings, not to produce and sell blueprints." *Id.* Other state courts have concluded that services which are incorporated in printed material are nontaxable. For example, the Illinois courts concluded that printers who receive copy for printed matter and who contract to print are not engaged in the business of selling tangible personal property. *A.B.C. Electrotype Co. v. Ames*, 364 Ill. 360, 4 N.E. 2d 476 (1936); *H. G. Adair Printing Co. v. Ames*, 364 Ill. 342, 4 N.E.2d 481 (1936), and *J. A. Burgess Co. v. Ames*, 359 Ill. 427, 194 N.E. 565, 566 (1935). *Burgess* stated: "It should be apparent that letterheads, circulars, mail-order catalogs, printed briefs for an attorney, or any other special printed matter, would be without commercial value, and it follows that the printer is engaged

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The sale of the journalist's work product—at least when it takes the form of a general interest magazine published within the State of Arkansas—is treated in an almost unique fashion as a "tangible sale of personal property" which is subject to the sales tax unless exempt. Of course, the Arkansas Supreme Court established in the instant case that sales of the appellant's publication do not fall within the Arkansas exemptions for newspapers or certain types of magazines.[24]

2. The Arkansas Tax Is Not of General Applicability

Compared to other laws which the press has challenged as abridging First Amendment rights, but which this Court

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Footnote continued—

only in service." *Id. Burgess* further observed, "We can perceive no logical difference between the paper upon which a photostatic copy of something is made or a blueprint produced, and that paper which a lawyer uses for writing a will or deed, a doctor for writing a prescription, or an abstractor for showing a chain of title. The paper is a mere incident; the skilled service is that which is required." In *Long v. Roberts & Son*, 3 Div. 212, 176 So. 213 (Ala. 1937), the Supreme Court of Alabama accepted an argument that the work of lithographing, copper plate engraving, and steel die embossing—commercial printing—and book binding do not constitute "selling at retail any tangible personal property," but are essentially services for which no tax is imposed. *See also Southern Bell Telephone and Telegraph Co. v. Department of Revenue*, 366 So.2d 30, 34 (Fla. 1st DCA 1978) (a sale should be treated as a sale of service if the only goods involved in the transaction "have only paper value apart from the information or events they record") (Smith, J., dissenting). *But see Eagerton v. Dixie Color Printing Corp.*, 421 So.2d 1251, (Ala. 1982) (holding the sale of a newspaper to the public is a retail sale of tangible property).

24. If this Court concludes, however, that the Arkansas tax may not constitutionally be imposed on sales of the Arkansas Times magazine, the Court should find that those sales are exempt from the tax. Arkansas Acts §84-1904(1) specifically exempts "Gross receipts or gross proceeds derived from sales for resale which the State is prohibited by the Constitution and Laws of the United States for taxing, or further taxing . . . ."

has upheld because of their equal impact on all enterprises, the Arkansas Gross Receipts Tax is dramatically different.

For example, in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), and *Associated Press v. United States*, 326 U.S. 1 (1945), the Court rejected arguments that the antitrust laws abridge the First Amendment. But unlike state sales taxes, the antitrust laws had not historically been riddled with "favored industries" exemptions. In *Citizen Publishing*, the Court, in emphasizing the general nature of the antitrust laws, cited a House Subcommittee report which identified only "[p]iecemeal exemptions." *Id.* at 139 n.4. Congress enacted none of the identified exemptions to encourage particular favored industries, but rather because application of the laws to the exempted activities would be impractical or impossible or because the exempted industries were subject to other regulations.[25] Nor has there been a tradition of exempting newspapers or magazines from the operation of the antitrust laws as has been true of sales taxes.[26]

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25. *See, e.g.*, 15 U.S.C.A. §1012(b) (1973) (McCarran-Ferguson Act exempting the "business of insurance"); 46 U.S.C.A. §814 (1973) (allowing the Federal Maritime Commission to approve certain maritime transactions); 15 U.S.C.A. §13(c) (1973) (Non-profit Institutions Act). In explaining the nature of the exemptions to the nation's antitrust laws, two leading authors have observed; "Competition enforced by the antitrust laws is sometimes thought impossible or inappropriate. Accordingly, special statutes have been enacted to modify, complement, or displace the competitive premises and rules of the antitrust laws. The normal antitrust standard may be expressly modified in relatively limited particulars." P. Areeda & D. Turner, *Antitrust Law* ¶221 at 133 (1978).

26. *See Part I. C.* of this brief, *infra*. It was only subsequently that Congress enacted a limited exemption to the antitrust laws to permit failing newspapers to enter into joint operating agreements. 15 U.S.C.A. §1801 (1973). The Newspaper Preservation Act was a direct reaction to the Court's position in *Citizen Publishing*. *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 473-74 (9th Cir. 1983).

The *Minneapolis Star* decision also relied on *Breard v. Alexandria,* 341 U.S. 622 (1951), and *Branzburg v. Hayes,* 408 U.S. 665 (1972), as examples of cases where "generally applicable" regulations had been upheld notwithstanding their impact on First Amendment rights. Both of those cases involved statutes to which there were no exemptions at all. Thus the regulations at issue in these two cases are materially different from the Arkansas Gross Receipts Tax.[27]

The ordinance at issue in *Breard* imposed a blanket prohibition on all door-to-door solicitations and had never exempted solicitations for the sale of periodicals.[28] The issue in *Branzburg* was whether a reporter, like all other citizens, must comply with a grand jury subpoena.[29]

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27. In a series of recent cases decided after *Minneapolis Star,* the Court has upheld criminal ordinances, notwithstanding their impact on First Amendment rights, on the theory that individuals may not "claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities." *Arcara v. Cloud Books, Inc.,* ..... U.S. ....., 54 U.S.L.W. 5060, 5062 (July 7, 1986) (order requiring one-year closing of bookstore found to be place of prostitution); *United States v. Albertini,* 472 U.S. ....., 105 S.Ct. 2897, 83 L.Ed.2d 504 (1985) (order barring protester from military base for improper conduct); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288 (1984) (ban on sleeping in park as applied to demonstrators against plight of the homeless). All of the regulations at issue in these cases, like the regulations in *Breard* and *Branzburg,* also truly were of general applicability in that they had not historically exempted the particular forms of expressive activity at issue nor had they exempted particular industries or speakers for political purposes.

28. The ordinance at issue in *Breard* applied to all "solicitors, peddlers, hawkers, itinerant merchant or transient vendors." 341 U.S. at 624. An ordinance of less broad applicability was struck down in *Martin v. Struthers,* 319 U.S. 141 (1943).

29. *Id.* at 685. The Court stated: "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas *as other citizens do* and to answer questions relevant to an investigation in the commission of a crime." *Id.* at 682 (emphasis added). Subsequent to *Branzburg,* a majority of jurisdictions have, however, recognized such a privilege either by statute or judicial interpretation.

The *Minneapolis Star* decision cited *Associated Press v. National Labor Relations Board,* 301 U.S. 103 (1937), as another case for the proposition that a generally applicable tax could be applied to the press. In that case, AP argued that it must have unrestricted freedom, including freedom from the requirements of the National Labor Relations Act, 29 U.S.C.A. §141 et seq. (1973). The Court held, however, "The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws." *Associated Press,* 301 U.S. at 132.

The National Labor Relations Act also is truly a regulation of general applicability. The few categories of exempt employers or employees which do exist have been found to be justified not because of any political favoritism toward them, but rather because the purposes of the Act would not be served by applying the Act to them. In *North Whittier Heights Citrus Association v. NLRB,* 109 F.2d 76, 80 (9th Cir. 1940), the court of appeals explained there is a "common denominator" to the exemptions in this Act. Acccording to the court, Congress exempted only employees who would not be "suffering under the difficulty of negotiating with the actual employer and there would be no need for collective bargaining and conditions leading to strikes would not obtain." *Id.*

Minneapolis Star lastly relied on *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946), and *Mabee v. White Plains Publishing Co.,* 327 U.S. 178 (1946), in support of the theory that generally applicable taxes are constitutional. In these cases, the Court expressly rejected an argument that the existence of some exemptions to the Fair Labor Standards Act made application of the Act to the press unconstitutional.

In footnote, however, the *Minneapolis Star* opinion rejected the State of Minnesota's argument that the *Oklahoma Press* decision established that "the press cannot successfully challenge regulations on the basis of the exemption of other enterprises." 460 U.S. at 585 n.5. The Court pointed out, "The exempt enterprises in *Oklahoma Press* were *isolated exemptions and not the rule.*"[30] *Id.* (emphasis added). As discussed in point I.B.1. of this argument, exemptions have been the rule rather than the exception when it comes to applying the state sales tax.

3. The Arkansas Tax Poses As Great a Threat to Press Freedom As the Minnesota Use Tax

In each of the cases discussed in the preceding section, the Court found that the regulations at issue did not violate the First Amendment because of their general applicability. When confronted with the tax at issue in *Minneapolis Star,* however, the Court reached the conclusion that the use tax imposed by Minnesota on print and ink could not be so characterized. Although the Arkansas and Minnesota taxes are in some ways distinguishable, a direct comparison of the two taxes discloses that the discriminatory nature of the Arkansas tax creates many of the same threats to First Amendment freedoms as did the Minnesota use tax.

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30. As is true of the exemptions to the antitrust laws, exemptions to the Fair Labor Standards Act do not exist for the purpose of favoring particular industries over others. "The section of the Act granting exemptions deals with employment of a character or with employees of a class to which application of the provisions of the Act for minimum wages and maximum hours is either impractical or impossible, or with employees in occupations in which the conditions of labor are regulated by other statutes, or with employees the greater part of whose labor is in intrastate commerce." *Helena Glendale Ferry Co. v. Walling,* 132 F.2d 616, 619 (8th Cir. 1942).

The *Minneapolis Star* decision identified three distinct dangers which the Minnesota use tax imposed on the press because that method of taxation was not generally applied to other taxpayers. First, the Court held that such a tax "may be used to destroy a selected group of taxpayers by burdensome taxation." 460 U.S. at 585. Second, the Court found the tax could "operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." *Id.* Finally, the Court held the tax "suggests that the goal of the regulation is not unrelated to the suppression of expression, and such a goal is presumptively unconstitutional." *Id.* The Arkansas tax also creates all of these threats to press freedom.

Many newspapers and magazines are only marginally profitable or not profitable at all. Among the least profitable publications are those which espouse politically unpopular viewpoints or which appeal to a fairly small segment of the population. For these publications, the issue of whether they must pay the sales tax is an issue of survival. In essence, many of these publications will continue to exist only if they are untaxed. If application of the Arkansas tax to sales of the Arkansas Times is sustained in light of the legislature's free discrimination between industries, no marginally profitable publication will be safe. When a tax is discriminatory, like the Arkansas tax, none of the safeguards which accompany regulations of general applicability comes into play. The tax could easily then be imposed on any presently exempt publications without imposing the tax on those favored industries which enjoy existing or future exemptions.

In addition, the power to exempt or repeal exemptions to this tax can be used as a perpetual threat against news-

papers or magazines. How many editorials will go unwritten, how many investigations will be left undone, how many profiles of political personalities will be discarded because of the economic fears that the sales tax exemption for particular types of publications, or all publications, will be amended out of the statute next year? Under the rational basis standard, the potential for political abuse, if only by the perpetual and undetectable threat to eliminate the existing exemption in the annual sales tax amendment process, is so great that that standard cannot apply. Generally applicable business regulations which have not historically been used as political carrots or sticks and which historically have been as fully applicable to the press as to any other industry pose no similar threat.

Even if the state could articulate some rational basis for treating sales of the Arkansas Times magazine differently than the sales of numerous other properties and services, the differential treatment in and of itself suggests that the Arkansas General Assembly is attempting to regulate expressive activity, as was the case in Minnesota.

Perhaps the strongest argument for attempting to distinguish the Arkansas and Minnesota taxes is that Arkansas is applying a sales tax to the sale of magazines rather than a "use tax."[31] But as shown by the analysis above this point of distinction is of very little importance because

31. Although the Minnesota tax at issue in *Minneapolis Star* was characterized as a "use tax," the Court pointed out that the tax at issue was really not the same type of tax as a "use tax" at all. A "use tax" generally is used solely for the purpose of "protect[ing] the State's sales tax by eliminating the residents' incentive to travel to States with lower sales tax to buy goods rather than buying them in Minnesota." 460 U.S. at 577. The Minnesota tax in *Minneapolis Star*, however, was not used for this purpose at all. Rather, it was used precisely for the same purpose as the sales tax—to raise revenue.

the historical discriminatory nature of the Arkansas tax creates the same dangers as the Minnesota tax created.

In addition, although this Court referred to the Minnesota tax as "singling out the press," that tax was no more directed at the press alone than is the Arkansas tax. The Minnesota use tax applied without exception to all industries and to all nonexempted uses of tangible personal property.[32]

C. In Recognition of the Constitutional Dangers of Imposing the Sales Tax on the Press, Arkansas and Other States Have Not Generally Done So

The Arkansas Gross Receipts (Sales) Tax Act has not historically been applied to most sales of information of importance to the citizens of Arkansas. Section 84-1904 provides that the following receipts or proceeds are exempt:

> (f) Gross Receipts or Gross Proceeds derived from the sale of newspapers . . . ."

* * *

32. The first paragraph of the statute at issue in *Minneapolis Star*, Minn Stat. §297A.14 (1982) provided: "For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricity, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of sales price of sales at retail of any of the aforementioned items made to such person after October 31, 1971, unless the tax imposed by section 297A.02 [the sales tax] was paid on said sales price." It was this tax which was applied to the press by virtue of an amendment which provided that "Notwithstanding any other provisions of section 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication . . . is subject to the tax imposed by this section."

(j) Gross Receipts or Gross Proceeds derived from the sale of religious, professional, trade and sports journals and/or publications published and printed within this State and when sold through regular subscriptions.

These exemptions have been a part of the Arkansas statutes almost since the sales tax was first imposed.[33] A survey of other state tax codes reflects that the Arkansas exemption for newspapers and some other publications is not unprecedented. Most of the states which impose a sales tax also have provided at least some type of exemption for the sale of newspapers, magazines or other sales of information which is deemed to be important to the citizens of the particular state.[34] These exemptions generally also

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33. When Arkansas first enacted its sales tax, 1935 Ark. Acts 233, it made no exemption for sales of publications. However, as noted in footnote 23 *supra*, the Attorney General of Arkansas concluded in 1939 that the sale of a "newspaper" is not the sale of tangible personal property and therefore not taxable. The "newspaper" exemption was added by Acts of Arkansas 1941, No. 386, section 4. The "journals and/or publications" exemption was added by Acts of Arkansas 1949, No. 152.

34. The States have not, however, been uniform in their attempt to define which information providers should be exempt and which should be non-exempt. *See* Ariz. Rev. Stat. Ann. §42-1317A.7 (1985) (magazines or periodicals or publications encouraging tourist travel); Ark. Stat. Ann. §84-1904(f) & (j) (1947) (gross receipts or gross proceeds from sale of newspapers; religious, professional, trade and sports journals and/or publications printed and published in-state and sold through regular subscriptions); Cal. Rev. & Tax. Code §6362 (West 1970) (newspapers or periodicals regularly issued); Conn. Gen. Stat. Ann. §12-412(6) (West 1986 Supp.) (magazine subscriptions and newspapers circulated among the public); D.C. Code Ann. §47-2005(6), §47-2001(r) (1981) (newspapers and publications for religious, scientific, charitable, or educational purposes); Fla. Stat. §212.08(6) & (7)(e) (1985) (newspapers and magazine subscriptions); Idaho Code §63-3622I (1985) (religious literature, pamphlets, periodicals, tracts and books published and sold by a bona fide church or religious denomination); Ind. Code Ann. §6-2.5-5-17 (Burns 1984) (newspapers);

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Iowa Code Ann. §422.45.9 (West 1986) (newspapers, free newspapers, or shoppers' guides); La. Rev. Stat. Ann. §47:305(4)(a)(v) (West 1986) (newspapers); Me. Rev. Stat. Ann. tit. 36, §1760.13 & .14 (1964) (bibles and publications issued at average intervals); Md. Ann. Code art. 81, §326(n) (1957) (printing and sales of newspapers of any and all types); Mass. Gen. Laws Ann. Ch. 64H, §6(m) (West 1969) (newspapers, magazines, books required for instructional purposes in educational institutions, books used for religious worship, publications of any non-profit corporation, foundation, organization or institution); Mich. Stat. Ann §7.525(h) (Callaghan 1986) (newspapers and periodicals delivered via second-class mail; any newspaper or periodical of general circulation established not less than two years and published not less than once a week); Minn. Stat. Ann. §297A.25(i) (West 1986) (any publication regularly issued at average intervals excluding magazines and periodicals sold over the counter); Miss Code. Ann. §27-65-111(b) (1972) (daily or weekly newspapers; periodicals or publications of scientific, literary or educational organizations exempt from federal income taxation); Mo. Ann. Stat. §144.030.2 (10) (Vernon 1986) (newsprint used in newspapers published for dissemination of news); Neb. Rev. Stat. §77-2704(d) (1985) (any regularly issued newspaper published at intervals not exceeding one week provided they contain matters of general interest and reports of current events); Nev. Rev. Stat. §372.315 (1981) (tangible personal property which becomes an ingredient or component part of any regularly issued newspaper); N.J. Stat. Ann. §54:32B-8(e) (West 1985) (newspapers, magazines, and periodicals); N.M. Stat. Ann. §7-9-63, §7-9-64 (1978) (newspapers and magazines); N.Y. Tax Law §115(a)(5) (McKinney 1986) (newspapers and periodicals); N.C. Gen. Stat. §105-164.13 (14) & (28) (1985) (Holy Bibles; newspapers sold by street vendors and door-to-door deliveries; magazines sold door-to-door); N.D. Cent. Code §57-39.2-04 (25) (1983) (Bibles, hymnals, textbooks, and prayerbooks sold to nonprofit religious organizations); Ohio Rev. Code Ann. §5739.02(B)(4) (Page 1985) (newspapers; magazine subscriptions shipped by second class mail); Okla. Stat. Ann. tit. 68, §1357(c) (West 1985) (carrier sales of newspapers and periodicals; sales of newspapers and periodicals; sales of newspapers and periodicals where any individual transaction does not exceed seventy-five cents); Pa. Stat. Ann. tit. 72, §3403-203(t)(v) (Purdon 1964) (religious publications sold by religious groups; bibles; periodicals and publications published at regular intervals); R.I. Gen. Laws §44-18-30(B)(HH)(QQ) (1985 Supp.) (periodicals; bibles; promotional and product literature of boat manufacturers); S.C. Code Ann. §12-35-550(7) (Law. Co-op. 1976) (newsprint paper; newspapers; religious publications); S.D. Codified Laws Ann. §10-45-12.1 (1986 Supp.) (newspaper sales and subscriptions); Tenn. Code Ann. §§67-6-323, 329 (3) (1983) (religious publications; newspapers); Tex. Tax Code Ann. §§151.319, 320 (Vernon 1982) (newspapers; magazine

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have been a part of the sales tax codes from the time that the states first imposed the taxes.[35]

These statutes can be interpreted in several ways. First, they plainly reflect a general consensus of the nation's legislators that the flow of information about matters of public concern should not be impeded by the imposition of sales taxes. Second, these exemptions can be interpreted as a conclusion by the states that imposition of their sales taxes on newspapers and magazines is constitutionally proscribed. Most of the states enacted sales taxes after this Court announced its decision in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), and most of those

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subscriptions entered as second class mail); Utah Code Ann. §59.15-4(b)(1) (1985) (newspapers); Vt. Stat. Ann. tit. 32, §9741(15) (1981) (newspapers with at least 10 percent news of general interest); Va. Code §58.1-608(13) (1950) (any daily or regularly issued publication excluding newsstand sales of the same); Wash. Rev. Code Ann. §82.08.0253 (1981) (newspapers); W.Va. Code §11-15-9 (1983) (sales of newspapers delivered by route carriers); Wis. Stat. Ann. §77.54(15) (West 1985) (newspapers and regularly issued periodicals); Wyo. Stat. §39-6-405 (xxi) (1977) (sale of newspapers).

35. The following is a compilation of the session law which first enacted the sales tax exemption referred to in note 34 *supra*. 1935 Ariz. Sess. Laws ch. 77; 1941 Cal. Stats. ch. 247 p. 1348 §28; 1948 Conn. Acts 1 §§5-7 (Spec. Sess.); 63 Stat. 115, ch. 146, tit. I, §128 (1949); 1949 Fla. Laws ch. 26319, §8; 1965 Idaho Sess. Laws ch. 195, §22(e)&(j); 1963 Ind. Act. ch. 30, §4 (Spec. Sess.); 1970 Iowa Acts ch. 1201 §2; 1948 La. Acts 9, §5(d); 1951 Me. Laws ch. 250, §10 XI & XII; 1947 Md. Laws ch. 281, §261(n)&(o); 1967 Mass. Acts ch. 757 §6(m); 1950 Mich. Pub. Acts 10 §4a(h); 1967 Minn. ch. 32, art. 13, §25(i) (Spec. Sess.); 1978 Miss. Laws ch. 347 §8(b); 1939 Mo. Laws p. 855 §3; 1967 Neb. Laws, sec. 4(d); 1969 Nev. Stat. ch. 306 §9; 1966 N.J. Laws ch. 30 § 8(e); 1969 N.M. Laws ch. 144 §§53 & 54; 1967 N.Y. Laws ch. 93 §1115(5); 1957 N.C. Laws ch. 1340 §5; 1967 N.D. Sess. Laws ch. 459 §29; 1933 Ohio Laws H.B. 134 §2; 1981 Okla. Sess. Laws ch. 313; 1963 Pa. Laws No. 43 §11; 1947 R.I. Pub. Laws ch. 1887 §31B; 1951 S.C. Acts No. 379 p. 686; 1935 S.D. Sess. Laws ch. 205 §34(a); 1947 Tenn. Pub. Acts ch. 3 §6; 1941 Tex. Gen. Laws ch. 184; 1969 Vt. Acts No. 144, subch. 2; 1966 Va. Acts ch. 151; 1935 Wash. Laws ch. 180 §19(c); 1974 W. Va. Acts ch. 136; 1969 Wis. Laws ch. 154 §260; 1979 Wyo. Sess. Laws ch. 41 §1.

enactments included exemptions for newspapers and magazines in their original form.. It therefore logically can be inferred that state legislatures have concluded *Grosjean* makes taxation of the sale of information—at least through imposition of their selectively applied sales taxes —impermissible.

The *Grosjean* decision itself cited an attempt by a state legislature to tax newspapers in 1785 as one of the historical events with which the Framers of the Constitution were cognizant and which "did much to bring about the adoption of the [first] amendment." 297 U.S. at 248. This passage may well have signaled to state legislators that use of their discriminatory sales taxes would not be tolerated. At the same time, the *Grosjean* decision did not discourage state legislatures from subjecting newspaper and magazine owners to other forms of taxation such as property and corporate income taxes. The lack of exemptions from these taxes in the states can logically be interpreted as a recognition by the states that those were the forms of taxation to which the *Grosjean* decision was referring when it stated, "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government." 297 U.S. at 250. It warrants emphasis that this passage spoke only of the taxation of *owners*, rather than the taxation of *sales*.

In recent years, economic pressures have forced the states to look to every possible source of revenue and many exemptions to sales tax laws have been eliminated.[36]

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36. In 1965, state sales and use taxes raised a total of $17.1 billion. U.S. Bureau of the Census, "Governmental Finances in 1964-65," GF 65 at 18. By 1980, states had more than tripled their sales and use tax revenue to $53 billion. U.S. Bureau of the Census, "Quarterly Summary of State and Local Tax Revenue," GT 80 No. 4, at 1, Table A (1981).

Even so, exemptions which exist for newspaper and magazine sales have for the most part remained intact. This is yet another indication that the states recognize the constitutional problem with imposing this particular tax on the press.

Several state court decisions tend to confirm that the intention of the state legislatures was both to avoid First Amendment problems and to encourage the free flow of information. For example, in *Sears, Roebuck & Co. v. State Tax Commission,* 370 Mass. 127, 345 N.E.2d 893, 896 (1976), the Massachusetts Supreme Judicial Court struck down a tax on advertising supplements inserted into Massachusetts newspapers. The court wrote, "We are confirmed in our reading of the statute by the obvious intention of the Legislature to free newspapers of a large part of the burden of sales and use taxes. . . . A tax on the advertising revenue of newspapers could have a devastating effect on First Amendment freedoms." *Id.* at 896 (citing *Grosjean v. American Press Co.,* 297 U.S. 233 (1936)).

Whatever the actual reason that most states have exempted sales of various types of information from their sales taxes, there is now a clear tradition in the United States of exempting such sales and it should be viewed as persuasive evidence that imposition of such taxes on the press would violate the First Amendment.[37]

37. This Court previously has looked to a traditional lack of press regulation as persuasive evidence that the First Amendment stands as a bulwark against such regulation. *See Press-Enterprise Co. v. Superior Court,* ..... U.S. ....., 54 U.S.L.W. 4869, 4871 (June 30, 1986); *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980). The lack of a tradition of exemption for the sale of machinery used in printing led the Illinois Supreme Court to uphold a tax on printing presses in *Chicago*

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The existence of a tradition of exemption also poses another serious danger to the press. State legislatures and courts could easily use the threat of ending that tradition as a means to control the press. For those publications with inflexible budgets, declining revenues, or marginal profits, the fear that their years of exemption from taxation may be ended may well chill much expression.

D. Arkansas Times Magazine Is Entitled to the Same First Amendment Protection Afforded to Other Members of the Press

The transaction at issue—sale of the Arkansas Times magazine to members of the general public—plainly is entitled to the protection which the First and Fourteenth Amendments afford other arms of the press.

In the *Grosjean* decision itself, the Court addressed the scope of the First Amendment protection it was affording when it stated, "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of information. *The newspapers, magazines and other journals of the country,* it is safe to say, have shed more light on the public and

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Tribune Co. v. Johnson, 106 Ill.2d 63, 87 Ill. Dec. 505, 477 N.E.2d 486 (1985), *appeal dismissed,* ..... U.S. ....., 54 U.S.L.W. 3270 (1985) (White, Stevens, and O'Connor, JJ., dissenting), notwithstanding that the Illinois Legislature enacted a recent amendment to its sales tax exempting machinery used in other types of manufacturing processes. Exclusion of magazines such as the Arkansas Times from an exemption does not alter the fact that the press generally has been exempted from this tax because exclusion of the Times based on its content is itself constitutionally prohibited. *Police Department of Chicago v. Mosley,* 408 U.S. 92, 96 (1972). And, as shown by *Point I.D., infra,* the Arkansas Times is entitled to the same First Amendment protection as other members of the press.

business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." 297 U.S. at 250 (emphasis added). The Court expressed no words of limitation in this passage, but rather extended First Amendment protection to any means of communicating important information, expressly including magazines.

In a number of recent decisions, this Court has held that the First Amendment "both fully protects and implicitly encourages" all types of "discussion of 'matters of public concern'" irrespective of the medium of transmittal or the identity of the speaker.[38]

The record in this case discloses that the Arkansas Times magazine is a publication which publishes matters of public or general concern as do other protected media. The affidavit of Allen Leveritt, publisher of the Arkansas Times, shows the journal has a monthly circulation of 23,000 subscriptions and 5,000 single copy sales.

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38. *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, ... U.S. ....., ..., 106 S.Ct. 903, 908 (1986) (public utility's newsletter the content of which ranged from energy-saving tips to stories about wildlife conservation, and from billing information to recipes) (Powell, J., announcing judgment of the Court in which Burger, C.J., and Brennan and O'Connor, JJ., concurred); *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530 (1980) (same); *First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978). *See also City of Los Angeles v. Preferred Communications, Inc.*, ... U.S. ....., 54 U.S.L.W. 4542, 4543 (April 29, 1986) (expressing the view that "'the business of cable television, like that of newspapers *and magazines,*'" "plainly implicate[s] First Amendment interests") (quoting brief of respondents emphasis added); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ... U.S. ....., 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (holding that constitutional protections against libel and slander actions protect all speech regarding matters of public concern).

In her deposition, H. Gail Price, manager of the State Sales and Use Tax Section of the Department of Finance, conceded that the Arkansas Times and the state's major daily newspaper are different only in format and depth of coverage. She testified:

> From a professional standpoint, I don't know how to compare the Arkansas Gazette with the Arkansas Times but personally feel they are different because the Times is more of a magazine. It usually goes into more detail on its article[s] but that is a personal observation, not a professional one. I would not take exception to the statement that they both contain articles concerning sports, religion, political and social events. (T. 196).

Many states which have considered the scope of their sales tax exemptions have construed their statutes broadly to encompass publications which are comparable to the Arkansas Times magazine. For example, the Supreme Court of Illinois ruled that magazines were exempt from sales tax under a statute that provided "the purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news (with or without other information) shall not be deemed to be a purchase, use or sale of tangible personal property." *Time, Inc. v. Hulman*, 31 Ill.2d 344, 201 N.E. 2d 374 (1964). Rejecting the arguments that the exemption statute encompassed only newspapers, the Illinois court recognized that newspapers and magazines compete for subscriptions and advertising, and that a contrary construction of the statute would create unconstitutional discrimination in favor of newspapers and against magazines. *Id.* at 352, 201 N.E.2d at 378. The court wrote:

> The power of the legislature to establish classifications which will extend a privilege to one group while denying it to another is well established. It is only that

classification which "unreasonably discriminates" against one group or another that violates the constitutional guaranties. After a full and careful consideration of the classes of newspapers and magazines disseminating news and information, we are of the opinion that there is no real or substantial difference between newspapers and plaintiffs' magazines. The same consideration which induced the legislature to recognize that publishers of newspapers were not within the taxable occupation carries over to publishers of news magazines or other news periodicals. *Id.* at 352-53, 201 N.E.2d at 378.

In one group of cases courts have held that state sales tax exemptions delineated for "newspapers" also extend to advertising supplements and other publications devoted primarily to advertisements.[39] In one case, the Vermont court employed a dictionary definition of "newspaper" to conclude that a weekly publication which consisted almost entirely of advertisements was within the state's "newspaper" exemption. *Hawden*, 139 Vt. at 39, 422 A.2d at 257.

Other types of publications, such as student newspapers, a map listing the addresses and directions to movie stars' homes, a "confidential" business publication, a tax publication, and a publication written for estate planners, all have been held to be well within the definition of exempt periodicals.[40]

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39. *Greenfield Town Cryer, Inc. v. Commissioner of Revenue*, 385 Mass. 692, 433 N.E.2d 898 (1982); *Sears, Roebuck & Co. v. State Tax Commission*, 370 Mass. 127, 345 N.E.2d 893 (1976); *Daily Law Record Co. v. James*, 629 S.W.2d 348 (Mo. 1982) (en banc); *Hawden, Inc. v. Department of Taxes*, 139 Vt. 37, 422 A.2d 255 (1980), *appeal dismissed*, 451 U.S. 977 (1981).

40. *See Campus Communications, Inc. v. Department of Revenue*, 473 So.2d 1290 (Fla. 1985) (construing exemption for sale of "newspapers" to include bulk sale of free distribution

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All of these cases recognize that the constitutional values which the exemptions were intended to protect is the free flow of information which is important to the citizens of a self-governing society. The Arkansas Supreme Court, in placing a narrow construction on its exemption for newspapers and magazines is aberational; that state's application of the statute as applied to sales of the Arkansas Times magazine now requires this Court to hold such taxation unconstitutional.[41]

II.

The State of Arkansas Has No Compelling Reasons for Imposing a Tax on the Appellant's Distribution of Information

The State of Minnesota argued in the *Minneapolis Star* case that raising revenue for the state was a com-

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student newspapers by printer to publisher and observing "a newspaper is a newspaper is a newspaper"); *Welton v. Los Angeles*, 18 Cal.3d 497, 556 P.2d 1119, 134 Cal.Rptr. 668 (1976); *Business Statistics Organization v. Joseph*, 299 N.Y. 433, 87 N.E.2d 505 (1949); *Research Institute of America, Inc. v. Department of Taxation & Finance*, 99 Misc.2d 243, 415 N.Y.S.2d 928 (1979). In *Welton*, a seller of maps in Hollywood, California, was exempted under the classification of "periodical" from both a city business tax and a state sales tax. The Supreme Court of California wrote that the "commercial character of [the seller's] activities does not deprive her of constitutional protection." 556 P.2d at 1122. The California Court supported its conclusion with three of this Court's decisions: *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Ginzburg v. United States*, 383 U.S. 463 (1966); *Smith v. California*, 361 U.S. 147 (1959). The California court added, "The fact that some may view the map as lacking opinion, newsworthiness or information of social worth. is constitutionally irrelevant. This court may not—consistent with its obligations to the Constitution—examine the map's content or venture an opinion of its social worth." 556 P.2d at 1122.

41. As observed in footnote 24 *supra*, a section of the Gross Receipts Tax exempts those sales which cannot constitutionally be taxed and therefore the statute itself need not be invalidated.

pelling interest which justified its tax in that case, but the Court rejected that argument as unpersuasive because the state had many other means available to raise revenue other than imposing a discriminatory tax against the press. The Court wrote:

> The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax which singles out the press.[42]

This Court also concluded in *Minneapolis Star* that any interest advanced by Minnesota to justify its scheme would be inadequate because the Minnesota tax not only singled out the press from different treatment, but because it "targets a small group of newspapers." 460 U.S. at 592. "Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." *Id.*

The State of Arkansas can offer no stronger reasons than did Minnesota for imposing its tax to sales of the

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42. 460 U.S. at 586. In support of the conclusion that a generally applicable tax could be imposed, the Court cited *United States v. Lee*, 455 U.S. 252 (1982), as standing for a different but analogous proposition. The *Lee* case does not actually support the proposition, however, because there the Court found the United States had an overriding interest in the taxing scheme at issue and for that reason, rather than the general applicability of the tax, this Court upheld the tax.

Arkansas Times and therefore the imposition of the Arkansas tax on such sales would violate the First and Fourteenth Amendments.

CONCLUSION

The decision of the Supreme Court of Arkansas should be reversed and sales of the Arkansas Times magazine should be held to be exempt from the Arkansas Gross Receipts Tax because application of that tax to such sales would abridge the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing motion for leave to file a brief *amicus curiae* and brief *amicus curiae* of the City & Regional Magazine Association were served upon each of the following, who comprise all of the parties required to be served, by placing said copies in the United States Mail, first class postage pre-paid, in accordance with Rule 28.3 of the Rules of this Court, on or before the 1st day of August, 1986.

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